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IN THE

Supreme Court of the United States

..... Term A. D. 1964.

No. 981

FRANK E. MEEKS,

Petitioner,

versus

GEORGIA SOUTHERN & FLORIDA RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA.

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No.

FRANK E. MEEKS,

Petitioner,

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GEORGIA SOUTHERN & FLORIDA RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA.

To The Honorable The Supreme Court of the United States of America:

Frank E. Meeks respectfully petitions this Honorable Court to grant the Writ of Certiorari to the Court of Appeals of Georgia in the above cause.

In this behalf, Petitioner shows unto the Court:

I.

OPINION OF THE COURT BELOW.

Georgia, Southern & Florida Railway Company, Appellant v. Frank E. Meeks, Appellee, 108 Ga. App. 808 (R. 187 and see Appendix to this Petition).

II.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Judgment to be Reviewed, dated December 3, 1963, (R. *205*), (Appendix A), Order Denying Motion for Rehearing dated December 20, 1963, (R. *206*), (Appendix B). Order of the Supreme Court of Georgia Denying Petition for Certiorari to that Court, dated February 10, 1964, (R. *207*), (Appendix C), and Order Withholding Transmission of the Remittitur from the Court of Appeals of Georgia to the Superior Court of Tift County, Georgia, dated February 14, 1964, (Appendix D).

Statutory Provisions Believed to Confer on this Court Jurisdiction to Review the Judgment in Question 28 U. S. Code, Sec. 1257 (3), (Appendix E).

The rights, privileges and immunities here claimed arise under the Federal Employers' Liability Act, 35 Stat. 65, 36 Stat. 291, 53 Stat. 1404, 45 U. S. Code, Sec. 51-60. (Appendices F, G, & H.)

III.

THE QUESTIONS PRESENTED FOR REVIEW.

(a) Whether there are probative facts in the record to support the findings of the jury that there was negligence on the part of the defendant or probative facts in the record from which the jury could have

inferred negligence on the part of the defendant which contributed, in whole or in part, to the injury sustained by petitioner;

(b) Whether the trial court erred in denying the defendant's motion for judgment notwithstanding the verdict;

(c) Whether the Court of Appeals' decision is in conflict with the controlling decisions of the United States Supreme Court.

The trial court held (R. 29) that there *was* evidence of negligence sufficient to support the findings of the jury in favor of the petitioner and overruled defendant railroad's motion for judgment notwithstanding the verdict.

The Court of Appeals of Georgia reversed (R. 204) holding that no act of negligence on defendant's part contributed, in whole or in part, to petitioner's injuries and that the trial court erred in denying defendant's motion for judgment notwithstanding the verdict.

(1) If petitioner, in the performance of his duties, was required to dismount from the engine of a freight train moving from 10 to 15 miles per hour onto sloping, rocky and unlevel ground where his footing was insecure, could the jury have found or inferred that such conditions amounted to negligence on the part of defendant railroad which contributed, in whole or in part, to petitioner's injuries? The Court of Appeals of Georgia erroneously held that it could not.

(2) Could the jury have found that the defendant railroad was negligent and that such negligence contributed, in whole or in part, to petitioner's injuries if, in the performance of his duties, he had to get into a stooped over, straining, awkward position on uneven, unlevel ground which was grown up with weeds in order to turn or throw a derailer which had not been greased, oiled or maintained for a least six months previously and which was stiff, tight, defective and hard to throw? The Court of Appeals of Georgia erroneously held that it could not.

(3) Could the jury have found that the presence of a buildup of approximately two feet of cement on the ground, causing the same to be unlevel and uneven in the area where petitioner had to "chock" a box car placed at said location, was negligence which caused, in whole or in part, petitioner's injuries when he had to get into a stooped over, straining, awkward position because of said conditions in order to perform his duties? The Court of Appeals of Georgia erroneously held that it could not.

The jury *was* authorized by the controlling authorities to find (and by its verdict for petitioner did so find) that one or more or all of the above-described (1, 2, or 3) events caused or contributed to cause petitioner's injuries.

By holding that petitioner failed to carry the burden of proof that his injuries were caused by an act of negligence on defendant's part, the Court of Appeals

of Georgia erroneously substituted its conclusions for those of the jury. Said decision is contrary to and conflicts with the controlling decisions of the United States Supreme Court.

The decision of the Court of Appeals of Georgia is in conflict with *Anderson v. Atchison, T. & S. F. R. Co.*, 333 U. S. 821, 68 S. Ct. 854, 92 L. Ed. 1108 (1948); *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444 (1943); *Blair v. Baltimore & O. R. Co.*, 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490 (1945); *Boston & Maine Railroad v. Meech*, 156 F. 2d 109 (1st Cir. 1946) (Cert. Den. Oct. 28, 1946), 329 U. S. 763, 67 S. Ct. 124, 91 L. Ed. 658; *Coray v. Southern Pacific Co.*, 112 Utah 166, 185 P. 2d 963, 335 U. S. 520, 69 S. Ct. 275, 93 L. Ed. 208 (1949); *Davis v. Virginian R. Co.*, 361 U. S. 354, 80 S. Ct. 387, 4 L. Ed. 2d 366 (1960); *Ellis v. Union Pacific R. Co.*, 146 Neb. 397, 19 N. W. 2d 641, 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572 (1947); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U. S. 521, 77 S. Ct. 457, 1 L. Ed. 2d 511 (1957); *Harris v. Pennsylvania R. Co.*, 361 U. S. 15, 80 S. Ct. 22, 4 L. Ed. 2d 1 (1959); *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946); *Lillie v. Thompson*, 332 U. S. 459, 68 S. Ct. 140, 92 L. Ed. 73 (1947); *Pauly v. McCarthy*, 109 Utah 398, 166 P. 2d 501, 330 U. S. 802, 67 S. Ct. 962, 91 L. Ed. 1261 (1946); *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493; *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520 (1944); *Tiller v. Atlantic Coast Line R. Co.*, 128 F. 2d 420 (4th Cir. 1942), 318 U. S. 54, 63 S. Ct. 444, 87 L.

Ed. 610 (1943); *Urie v. Thompson,* 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949); *Webb v. Illinois Central R. Co.,* 352 U. S. 512, 77 S. Ct. 451, 1 L. Ed. 2d 503 (1957); *Wilkerson v. McCarthy,* 112 Utah 300, 187 P. 2d 188, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1947), and many other cases set forth in this petition.

Some of the language from the above cases is particularly applicable here. In *Lavender v. Kurn, supra,* this court stated:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.
>
> "But where, as here, there is an evidentiary basis for the jury's verdict, . . . the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

In *Tennant v. Peoria & P. U. R. Co., supra,* this court stated:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury . . . It is the jury, not the court, which is the fact-finding body . . . the very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."

In *Bailey v. Central Vermont R. Co., supra,* this court stated:

> "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

In *Jamison v. Encarnacion,* 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082 (1930), this court stated:

> "The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning."

And in *Rogers v. Missouri Pacific R. Co., supra,* this court stated:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

This Court has recognized that a railroad's duty to exercise reasonable care extends to protection of its employees from any and all sorts of harm. See *Lillie*

v. Thompson, supra. (Unprotected telegraph operator criminally assa lted); *Urie v. Thompson, supra,* (exposure to silica dust); *Anderson v. Atchison, T. & S. F. R. Co., supra,* (exposure to weather).

IV.

STATUTES INVOLVED.

The statutes involved are:

28 U. S. Code, § 1257 (3)	(Appendix E), Page 50
45 U. S. Code, § 51	(Appendix F), Page 50
45 U. S. Code, § 53	(Appendix G), Page 51
45 U. S. Code. § 54	(Appendix H), Page 52

V.

STATEMENT OF THE CASE.

(a)

The Material Facts.

This action was brought in the Superior Court of Tift County, Georgia, by petitioner, Frank E. Meeks, under the Federal Employers' Liability Act, 45 U. S. C. A., § 51-60, to recover damages for personal injuries suffered by him on March 6, 1960, as a result of the negligence of respondent. (R. 4-15.)

The action was brought in three counts, each setting out acts of negligence which were alleged to be the proximate cause or contributing causes of injuries

complained of by petitioner. It was alleged that petitioner was employed by the defendant as a switchman in the crew of a local freight train which departed Valdosta, Georgia, with Macon, Georgia, as its ultimate destination. The train was to stop at an industrial plant (the Tifton Concrete Pipe Company) just south of Tifton, Georgia, and one car of cement was to be placed on a side track serving that industry. Petitioner, in order to be in the proper position for the performance of his duties, had to dismount from the engine at a certain spot south of the switch to the siding. The area thereabout had no path upon which to walk, but was sloping away from the tracks, was rocky, unlevel and uneven; the footing there was insecure. When the engine approached the area it was traveling at a speed of approximately 10 to 15 miles per hour, which was faster than was reasonable and safe under the circumstances. Petitioner alleged in Count One that the aforesaid circumstances caused the place of work to be unsafe and said unsafe conditions and place of work was the sole proximate cause, in whole or in part, of his injuries or contributed with other negligent acts set out in the other two counts to cause his injuries.

In Count Two he alleged that after dismounting and uncoupling certain cars from the rest of the train, his next duty was to remove a derailer from the side track into which the car of cement was to be placed. The handle of the derailer was located only six to seven inches from the ground and this necessitated his getting into a stooped-over, crouched, awkward posi-

tion. He alleged that the area around the derailer was rocky, sloping and grown up with weeds; that the derailer itself was old, rusty, worn and had not been greased, oiled or properly maintained and was stiff, tight, defective and difficult to operate. That the condition of the ground, combined with the defective condition of the derailer, the position he had to get into, and the force he had to exert was the proximate cause of his injuries, or contributed with other alleged negligent acts to cause his injuries.

In Count Three petitioner alleged that the area where the car for the Tifton Concrete Pipe Company was "spotted" was not a reasonably safe place for him to perform his duties for that said area, because of the cement spillage in the past had built up to a height of approximately two feet from the ground and was uneven and unlevel and when petitioner had, as his job required, tried to place a chock under the wheel of said car to keep the same from rolling out of the track, he, of necessity, had to get into a straining, awkward and stooped-over position to lean under the car to place said chock and he alleged that said unsafe condition was the proximate cause of his injuries, or contributed with other alleged acts of negligence to cause his injuries.

In each of the three counts petitioner alleged that the conditions complained of constituted a place of work which *was not reasonably safe* due to defendant's negligence and that (in Count Two) defendant further was *negligent in furnishing an appliance (derailer) which was defective.*

After performing these various tasks, and while walking back to the engine, petitioner felt pain in his back. (R. 37.) He testified that he did not know which of the three situations resulted in his back condition, ". . . but it was one of them." (R. 155.) After getting on the engine he was in such severe pain that he could perform no more work.

In support of his complaint, petitioner testified regarding negligence alleged in Count One: (R. 31)

> ". . . . He slowed down for that stop when I told him the second time we had a car to set off at the Tifton Concrete Pipe Company . . . That track coming off down here is the industrial track at the Tifton Concrete Pipe Company. The area along there, where you have shaded it out with your finger, to here has a lot of ballast ranging from the size of a marble up to the size of my fist sloped up there. It is sloped right up to the ties. When you get in this area you find the slope built up all along the industrial track.
>
> "There is no pathway, along here, that is level and smooth." (R. 32.)
>
> "As the train moved along north on the main line track and got along where I have described I was to get off, the speed of the train was between ten and fifteen miles an hour.
>
> "The usual speed for dismounting is five to ten miles an hour." (R 32.)
>
> ". . . When I got off it was necessary for me to run to keep my balance in that rock and slag . . . ." (R. 32.)

Conductor A. E. Woodard testified: (R. *70*)

"Q. You recall this is the shoulder of a ditch that slopes from the main line east and down?

"A. There is a ditch right up to the track.

"Getting on up here a little closer to the frog—I call this the frog—along about the frog the crossties come all the way across. In a regular switching yard, a path is more or less level like the floor; but out there on that track, or any other outlying industrial track, they are not necessarily smooth." (R. *70-71.*)

"Q. In this area there is some grass in the ditch and as you get up here you have this ballast all the way across both of these tracks?" (R. *71.*)

"A. I expect it would extend across up there close to the frog.

"Q. Along in here the pathway falls off, and there is no place to drop off?

"A. Well, you have only got the roadbed. In some places it is pretty steep." (R. *71.*)

Tom Judge, Flagman, testified as follows: (R. *73*)

"There is a good deal of trash and debris around this industrial area."

As to proof of negligence alleged in Count Two, Meeks testified: (R. *53*)

"* * * This handle is approximately six inches off the ground. The handle is some six to seven inches above the track. In order to throw it, you have to get down on your knees.

"The area right around this derailer, in that general area, has ballast and weeds and things.

The ground is uneven. There are low places and high places, and there is a drainage ditch that runs back south of the main line. The footing around in this area is rough." (R. 34.)

"What I did with reference to this derailer was I unlocked it and tried to throw it off with one hand—if it works right, you can do it with one hand—and it didn't move. Then I took both hands and put on it, and it seemed to hold, and I got on top of the rail and pulled it, and it put me in an awkward position to reach that far. It was about as far apart as I indicate." (R. 34.)

"I had worked in that area before. The condition of the derailer then had been hard." (R. 34.)

"This derailer did not seem to be well conditioned, well lubricated; as far as oil, I never seen any on it. I have never seen anybody down there working on it. To my own knowledge, it had not been properly maintained and greased for six months prior to the time I was hurt." (R. 35.)

Tom Judge, Flagman, testified: (R. 73)

"I have worked in this area where Mr. Meeks got hurt. I have operated this derailer myself. At times I have found it difficult to operate.

And: (R. 74-75)

"Q. After refreshing your memory from this paper, could you give us any further information about the derailer at the Tifton Concrete Pipe Company, Mr. Judge?

"A. Sometimes you would have to take the handle and pull it down, but I don't recall ever having used the handle.

"Q. If the derailer is properly lubricated, would you have to do that?

"A. Well, no, sir. . .

"Q. If one is working properly, all you have to do is unlock it, and you have to get down on the ground pretty low, don't you?

"A. Pretty low.

"You just have to unlock it, get down and turn the pin, and it comes over."

"* * * I think I am familiar with the proper operation of derailers similar to the one located at the Tifton Concrete Pipe Company."

"Q. Would you think one was in proper operating condition that you had to work with one hand and jimmy the handle with the other in order to get it loose, or would you think one you could not just unlock, lift the lever, and operate with one hand was one that was in proper working order?

"A. Well, I would think one you had to do that with wasn't working properly."

The proof of negligence of defendant alleged in Count III is seen in Meeks' testimony: (R. 35-36)

"That area, from where they unloaded cars, there would be a spillage of cement and waste and, being there over a period of time, caused it to become hard. It would pile up to about twenty-four inches.

"With the wheels of the car on the track, the car would hang over the rail approximately thirty inches. * * * My position was a squatting position, and then I had to put the wood under that car wheel. It was an awkward position.

"Plaintiff's exhibit 1 shows the waste that has built up at the Tifton Concrete Pipe Company.

"Plaintiff's Exhibit 3 shows the clearance between the industrial track and the main line track and the wastage."

Conductor A. E. Woodard testified. (R. 71)

"Q. Down here, where the Concrete Pipe Company is, that cement has built up to a pretty good height?

"A. Well, I just don't know how high it is. There is some scattered cement there, but I just don't remember. I haven't been to the track in over a year. There is some cement there that has set up."

At the conclusion of all the evidence, defendant made a motion for a directed verdict which was denied by the Court. (The motion and ruling were not included in the Brief of Evidence prepared by defendant for use in the Court of Appeals.) Following the verdict and judgment for plaintiff (R. 25, 26), the defendant filed a motion for judgment notwithstanding the verdict (R. 27) which was denied by the Court on the 21st day of May, 1963. (R. 29.)

VI.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

POINT I.

THE COURT OF APPEALS OF GEORGIA IMPROPERLY INVADED THE PROVINCE OF THE JURY.

In recent years this Court has had occasion, in many instances, to express itself regarding the respective functions of the Court and jury, including the scope of appellate review in cases arising under the Federal Employers' Liability Act. The basic decisions are collected and set forth in *L. & N. R. Co. v. Botts*, 173 F. (2d) 164, 167, (CCA 8, 1949):

> "(2-3) The opinions of the Supreme Court have declared that it is 'the clear Congressional intent that, to the maximum extent proper, questions in actions arising under the Act should be left to the jury.' *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 58, 63 S.Ct. 444, 451, footnote 30, 87 L. Ed. 610, that such cases may not be taken from the jury merely because the question of liability is 'close or doubtful,' *Bailey v. Cent. Vt. R. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; that the jury has the right to make 'all reasonably possible inferences' from such probative facts in the evidence as it chooses to accept, and 'It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on the theory that the proof gives equal support to inconsistent and

uncertain inferences,' *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 32-35, 64 S. Ct. 409, 411, 412, 88 L. Ed. 520; that in any choice between possible inference 'a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference,' but 'Only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear,' *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740, 744, 90 L. Ed. 916; and that the assumption that, on an issue of liability, 'juries will invariably decide . . . against railroads' is 'contrary to fact,' and courts may not act on the theory that 'juries will fall short of a fair performance of their constitutional function,' but they must assume that a jury 'finds facts only because they are proved,' *Wilkerson v. McCarthy*, 69 S. Ct. 413, 418."

To these decisions may be added the cases of:

Stone v. N. Y. C. and St. L. R. Co., 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed. 441;

Carter v. St. Andrews Bay R. Co., 338 U. S. 430, 70 S. Ct. 226, 94 L. Ed. 236;

Affolder v. N. Y. C. & St. L. R. Co., 339 U. S. 96, 70 S. Ct. 509, 94 L. Ed. 683;

Coray v. Sou. Pac. R. Co., 335 U. S. 520, 69 S. Ct. 275, 93 L. Ed. 208;

Dennis v. Denver & R. G. W. R. Co., 84 S. Ct. 291;

Gallick v. Baltimore & O. R. Co., 272 U. S. 108-22, 83 S. Ct. 659;

Schultz v. Penn. R. Co., 76 S. Ct. 608;

on the question of proximate cause.

Thus it seems clear that if there are evidentiary facts which, as a matter of law, constitute negligence, the jury's verdict and the trial court's denial of Motion for Judgment Notwithstanding the Verdict should not be reversed on appeal.

In: *O'Day v. Chicago River & I. R. Co.*, 216 Fed. 2d 79, the following language appears:

> (1) "The rule is well-established that a motion for a judgment notwithstanding the verdict presents *only a question of law as to whether, when all the evidence is considered together with all reasonable inferences most favorable to plaintiff, there is a total failure or lack of evidence to prove any necessary element of plaintiff's case.*" (Emphasis added.)
>
> *Wilkerson v. McCarthy, (supra);*
> *Sivert v. Penn. R. Co., (7 CCA) 197 F. 2d 371, 375, (1) (2);*

in which latter case it was held:

> (1) "A motion for judgment notwithstanding verdict raises only the question of law of whether there is any evidence which if believed by jury, would authorize a verdict against party making the motion."
>
> (2) "On defendant's motion for judgment notwithstanding verdict, proof must be considered in the light most favorable to plaintiff."
>
> *Marsh vs. Ill. Cent. R. Co., 175 F. (2d) 498, 499 (5 CCA).*

POINT II.

THE COURT OF APPEALS OF GEORGIA IMPROPERLY HELD THAT PETITIONER FAILED TO CARRY THE BURDEN OF PROOF THAT HIS INJURIES WERE PROXIMATELY CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENCE ON THE PART OF THE RESPONDENT.

In determining whether the evidence presented a jury question on the issue of negligence: "We must assume the most favorable statement of plaintiff's case to be true."

Texas & Pac. R. Co. v. Behymer, 189 U.S. 468, 23 S. Ct. 622, 47 L. Ed. 905, and

". . . the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury."

Ellis v. Union Pac. R. Co., [Supra].

Factual Basis for Jury Finding of Negligence.

The evidence adduced was that petitioner had, among other things, three specific duties to perform in an area about *thirty feet* in diameter (R. 37) and that the total time elapsed for the performance of the same was approximately *five minutes*. Each of the duties was accompanied by defendant negligence, (a failure to furnish a safe place to work and safe appliances with which to perform his duties), and each act of negligence was proved upon the trial of the case. There is no question about the terrain within this thirty foot area—

it was sloping, uneven, unlevel, rocky, grown up with weeds and "There is a ditch right up to the track", there was direct evidence that the derailer which petitioner had to throw had not been properly maintained and was stiff, tight and difficult to throw and, though petitioner did not know which of the three instances resulted in his injuries, he testified that it was one of the three.

The Court of Appeals of Georgia has improperly and erroneously gone outside the record and stated that petitioner's injuries *might have been the result of some other activity* in which he was engaged (R. *202*) but Meeks was the only person performing the three tasks complained of and under the conditions complained of; he was the only person who knew the degree of stress and strain required by each activity and, for that matter, by any of the other duties (not complained of) that he performed. The jury accepted Meeks' version as opposed to Respondent's version when it awarded him a verdict.

In *Bailey v. Cent. Vt. R. Co., supra*, this Court stated:

> "The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of the guard-rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether re-

spondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions emphasize the appropriateness of leaving the question to the jury."

The Court of Appeals of Georgia erroneously held (R. *201-203*):

"Assuming for the sake of argument only, however, that a finding was authorized that the defendant railroad was negligent in at least one of the particulars charged in the petition, there is still another reason which impels the conclusion that the plaintiff failed to carry the burden of proof in this case.

". . . 'The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration, unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer." (Cases cited.)

"The plaintiff testified that he did not know which one of the three incidents set forth in his petition caused his back injury but that he knew that one of the three was responsible for the same. This conclusion, however, was unsupported by any evidence *which directly showed* that any of the three occurrences specifically caused or contributed to the injury; . . . There were no probative facts from which the jury could reasonably infer that the plaintiff's back injury resulted

> from the activity relied on in any one of the three counts of the petition as opposed to th. . . . other duties performed by the plaintiff . . .
>
> "Under these circumstances, the jury could do no more than guess or speculate as to the immediate cause of the plaintiff's injuries and such evidence is insufficient to support a verdict."

This is an erroneous legal conclusion conflicting with the United States Supreme Court's decision in the *Gallick* case (*supra*). Reading from the *Gallick* case on page 663 it will be noted that the decision of the Court of Appeals of Ohio *which was reversed by the Supreme Court of the United States* held practically the same thing:

> "'(W)e have a chain of possibilities that the negligence of the defendant might have shared in subjecting the plaintiff to damage and injury, but proof of a legal causal connection between the negligence and the damage falls short of that required for the consideration of a jury.' Ibid. Accordingly, it reversed the judgment of the Court of Common Pleas and entered final judgment for respondent."

The opinion of the Court of Appeals of Georgia is in direct conflict with *Gans v. B. & O. R. Co.*, 319 Fed. (2d) 802, wherein the United States Court of Appeals for the Third Circuit held:

> "It is apparent that, with just as much reason as finding the railroad proximately to blame under the scant known circumstances, the jury could have found, as it did, either that neither side was

> at fault or that the unfortunate happening involved was due to carelessness by Gans. In the present state of the Federal Employers' Liability Act decisional law, the district judge was duty bound to let the jury pass upon the validity of the Gans cause of action. In the state of the whole record, he was also required to submit the question of decedent's contributory negligence for jury decision." (This the trial court did in the case at bar.) (R. 173).

The opinion of the Georgia Court of Appeals is in conflict with the recent case of *Dennis v. Denver & R. G. W. R. Co.*, 84 S. Ct. 291, a case in which the plaintiff did not know when his injuries occurred.

The petitioner in this case lost several fingers as a result of frostbite and exposure from being required to work in sub-freezing weather when he had insufficient wearing apparel. His fingers became frozen sometime between 5:00 P. M. and 5:00 A. M. The United States Supreme Court in reversing the Supreme Court of Utah held:

> "In this case petitioner's evidence, *though vigorously disputed*, was sufficient to support the jury's conclusion that Respondent's negligence contributed to the injury. Hence 'the appellate court's function (was) exhausted,' Lavender v. Kurn, supra, 327 U. S. at 653, 66 S. Ct. at 744, 90 L. Ed. 916, and it could not properly substitute its judgment for that of the jury and decide as the Supreme Court of Utah did here that 'it seems quite inescapable that it was (petitioner's) own conduct . . . that resulted in this regrettable injury.'" (Emphasis added.)

The opinion of the Court of Appeals of Georgia is, in still another way, in conflict with the opinion in the case of *Gallick v. B. & O. R. Co.*, 83 S. Ct. 659. In that case, from a jury verdict for petitioner, Respondent appealed and the Court of Appeals of Ohio reversed. The Supreme Court of Ohio rendered final judgment for Respondent railroad. The United States Supreme Court reversed. Petitioner in this case was bitten by a bug or insect and developed an infection which later necessitated the amputation of both legs. To award petitioner a verdict the jury had to find that the maintenance by Respondent of a filthy pool of water near which petitioner had to work was negligence and attracted disease-carrying bugs or insects; that an insect from said pool bit petitioner; that the insect bite was something which the defendant should have foreseen and guarded against. The United States Supreme Court held:

> ". . . *court erred in demanding either direct evidence* that existence of unidentified bug which bit railroad employee had any connection with stagnant and infested pool on railroad right of way *or else more substantial circumstantial evidence than adduced* that pool created conditions and influences which helped to incubate or furnish environment for insects, or that insect, having travelled from other areas, became contaminated or infected by pool, and in reversing plaintiff's judgment under Federal Employers' Liability Act the only question was whether insect was from or had been attracted by pool. . ." and "If there is evidence *that any employer negligence caused harm*, or enough to justify jury's determination

> that *employer negligence played any role in producing harm*, it is error to refuse to accept jury's verdict against railroad 'in suit under Federal Employers' Liability Act." and "Element of reasonable foreseeability of harm in Federal Employers' Liability Act case arising out of insect bite was satisfied by jury's finding of negligence in maintaining filthy pool of water. . . ." (Emphasis added.)

The opinion of the Court of Appeals of Georgia is in conflict with the case of Schultz v. Penn. R. Co., 350 U.S. 523, 76 S.Ct. 608, 100 L. Ed. 668. There the lower court said:

> "There is some evidence of negligence and there is an accidental death. But there is not a shred of evidence connecting the two."

The United States Supreme Court in reversing held:

> ". . . We think the evidence was sufficient to require submission of the case to the jury, and that it was error not to do so."

The facts in the *Schultz* case essentially were these: A tug boat fireman was drowned in undetermined circumstances arising from his work on dark, icy and undermanned boats.

The opinion of the Court of Appeals of Georgia is in conflict with *Lavender v. Kurn*, 327 U. S. 645, 66 S Ct. 740, 90 L. Ed. 916, a Federal Employers' Liability Act case in which it was uncertain which of various alternative explanations for the cause of the injury

appeared in the record. Petitioner's and Respondent's theories both were reasonable and plausible. The jury found for petitioner, the lower court reversed for insufficient evidence, the United States Supreme Court reversed on the ground that the lower appellate court had committed "an undue invasion of the jury's historic function."

The decision of the Court of Appeals of Georgia is in direct conflict with another Court of Appeals of Georgia decision, *A. C. L. R. Co. v. Singletary*, 80 Ga. App. 297, a case brought under the Federal Employers' Liability Act, as was the case at bar, in three separate counts. On Page 306 of that decision the Court said:

> "However, if the jury decided that the death resulted in one of the three ways shown in the petition and that the negligence of the railroad was in part or in whole the proximate cause thereof, a general verdict would have been authorized without the jury's being required to find exactly which theory was correct."

The Georgia Court of Appeals' decision is in conflict with *Anthony v. L. & N. R. Co.*, 316 F. (2d) 858, in which case the plaintiff testified with reference to how his injury occurred:

> "With further reference to my accident on May 15, 1959, at Hope, Arkansas, I do not know just what hit me across the head and knocked me from the car, but it was some part of the shed or building just adjacent to the spur track. It just had to be some part of that building. . ."

As to the specific acts of negligence alleged, the Court of Appeals' holding of "no negligence" is in conflict with the following cases. As to the rough, unlevel and uneven area over which and upon which plaintiff had to perform his duties, the railroad was held negligent in *Webb v. I. C. R. Co.*, 77 S. Ct. 451 (2): "Railroad negligently causing or permitting fist-sized clinkers to be imbedded in roadbed is liable under Federal Employers' Liability Act to employee injured as a result of such hazardous condition." On Page 453 of that decision the Court said that the railroad had a duty ". . . in inspecting roadbeds for hazards to firm footing."

In *A. C. L. R. Co. v. Gunter*, 229 Fed. (2d) 842, a brakeman was allowed to recover under the Federal Employers' Liability Act for damages resulting from injuries sustained in alighting from a moving freight car and stumbling on clinkers and ballast strewn beside the track and on the crossties.

See also: *Brown v. Western Ry. of Ala.*, 70 S. Ct. 105.

Referring to Count Two, the evidence is quite clear that the derailer which petitione had to turn or throw was not properly maintained; was and had been difficult to turn or throw. By its finding that this did not constitute negligence or a "defect or insufficiency due to its negligence in its appliances," the decision of the Court of Appeals of Georgia is in conflict with the statute itself, 45 U. S. Code §51.

As to the Third Count, wherein, because of the condition of the ground, plaintiff had to get into an awkward

crouched and straining position in order to "chock" the car, the Court of Appeals of Georgia's decision that this condition did not constitute negligence or that the jury could not have inferred that it was negligence, is in direct conflict with *Schenker v. B. & O. R. Co.*, 83 S. Ct. 1667, a case in which the injured employee, because of a defect in the door of a baggage car, was allowed to recover for injury sustained when he had to get into a twisted, awkward position in order to load mail sacks.

It is a well-settled fact that juries in Federal Employers' Liability Act cases are allowed to make inferences in arriving at their verdicts if there is any evidence, even the slightest, that defendant negligence played any role in producing the harm.

> *Rogers v. Mo. Pac. R. Co., 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493.*

In *Lavender v. Kurn, supra*, the United States Supreme Court said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is

free to discard or disbelieve whatever facts are inconsistent with its conclusion."

The decision of the Court of Appeals of Georgia, in reversing the jury verdict for petitioner, is in conflict with the decisions of *Rogers v. Mo. Pac. R. Co.*, and *Lavender v. Kurn, supra*, and it is also in conflict with *Gibson v. Elgin, J. & E. R. Co.*, 246 F. 2d 834, another case in which the employee was not sure how he sustained his injury. In this case [Gibson] the testimony as to how the employee was injured is as follows:

> ". . . all I do know and do remember is that in backing out in that stooped position my one foot *must have slipped*, and catching myself I *must have straightened up*, and then I banged my head." . . . "I don't remember what it slipped on other than just grime on the floor or maybe grease."

There was a verdict for the plaintiff but the trial court granted defendant's motion for judgment notwithstanding the verdict, holding that the jury verdict could not stand because the jury, to find for plaintiff, would have to:

> ". . . infer, first, that there was such a substance at the place where the plaintiff was bending under the desk and, second, that he actually slipped because of such condition. Thus, the finding essential for the support of the verdict is based upon one inference which rests in turn upon another inference."

The United States Court of Appeals for the 7th Circuit reversed and reinstated plaintiff's verdict.

CONCLUSION.

The Court of Appeals of Georgia has denied petitioner the right of trial by jury. It says: (R. 194)

> "It is not, however, the function of the trial court in an action under the FELA to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences and courts are not free to reweigh the evidence and set aside a jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

But this is exactly what the Court of Appeals of Georgia has done and its decision should be reversed.

If the opinion of the Court of Appeals of Georgia is allowed to stand, it will serve to ". . . deprive these workers of the benefit of a jury trial in close or doubtful cases . . . (and) . . . take away a goodly portion of the relief which Congress has afforded them." *Bailey v. Cent. Vt. R. Co., supra;* if the opinion of the Court of Appeals of Georgia is allowed to stand, it will have the effect of saying the decisions in FELA cases must be uniform throughout the United States *except in Georgia.*

It is respectfully submitted that the opinion of the Georgia Court of Appeals is in conflict with many decisions of the State and Federal Courts and the FELA itself. For the reasons herein set forth, a writ of certiorari should be granted and petitioner's verdict reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

This is to certify that I have this day served Messrs. Bloch, Hall, Groover & Hawkins, attorneys for Respondent, P. O. Box 176, Macon, Georgia, with a copy of the Petition for Writ of Certiorari and Appendices in the above stated case by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This ..... day of ....., 1964.

.....
Attorney for Petitioner.